In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 94

JOHN J. PYNE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 191 Misc.

JOHN M. FELLABAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1969. Petitions for rehearing were denied on April 3, 1969. The petitions for writs of certiorari were filed on May 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge of conspiracy to violate 18 U.S.C. 1952 was adequately proved by evidence which established an agreement to cause another's interstate travel, in order to engage in extortion.

2. Whether sufficient evidence supports the finding that petitioner Fellabaum had knowledge of the interstate nature of the conspiracy (Pet. No. 191 Misc.).

3. Whether the district court erred in admitting testimony concerning three statements petitioner Fellabaum made to an F.B.I. agent after being fully informed of his rights and after affirmatively waiving his right to the presence of the attorney whom he had retained for another case (Pet. No. 191, Misc.).

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois under an indictment charging that they and others conspired, 18 U.S.C. 371, to travel or cause travel in interstate commerce with intent to engage in extortion, 18 U.S.C. 1952. Petitioner Fellabaum was sentenced to imprisonment for a term of three years, to run consecutively to two other consecutive terms, of four and five years, which had been imposed in previous, similar cases (R. 95).[1] Petitioner Pyne was fined $10,000 and sentenced to imprisonment for five years consecutive to another five year term previously imposed in a similar case (R. 107). The court of appeals affirmed the convictions (Pets. App. A).

[1] "R." refers to the volume of the certified record containing the miscellaneous papers filed in the district court. "Tr." refers to the three-volume transcript of the trial proceedings.

The evidence of the offense is set forth in some detail in the opinion of the court of appeals (Pet. No. 94, App. A 2–3; Pet. No. 191 Misc., App. A 2–3) and that resume has been adopted by both petitioners. Briefly, the evidence shows that petitioner Fellabaum engaged in a homosexual act with a man in Chicago, then demanded and obtained the man's wallet (Tr. 39–41, 77–78, 86–88, 90–91). Two days later, Fellabaum delivered several cards from the wallet to one Hammock in New York and told him that the man appeared to be a good prospect for extortion (Tr. 90–92). Hammock promptly informed petitioner Pyne of the matter (Tr. 93, 95–96). In turn, Pyne informed one Kaminsky (Tr. 105–107), and within two days the three of them met in Chicago, discussed when they should approach their proposed victim, and telephoned Fellabaum in New York to join them (Tr. 106–119). Subsequently, Hammock was arrested by the FBI for another offense, and agreed to act as an informant in the present case (Tr. 121). Later Kaminsky telephoned Hammock in North Carolina and told him to proceed to Chicago (Tr. 139–142). Two days later, Kaminsky, Hammock, and Pyne met in Chicago (Tr. 145–157). The following day they started to drive to the home of the proposed victim; en route, however, they decided that they would arrive too late in the day—after banking hours—and therefore postponed the approach (Tr. 157–166, 171). Petitioners and the others were subsequently arrested.

ARGUMENT

1. Petitioners urge that their convictions for a conspiracy contemplating interstate travel cannot be based on Hammock's trip from North Carolina to Illinois, the only actual travel charged in the indictment, since he was then acting as a government informant. Petitioners were charged not with Hammock's travel or agreement to travel, however, but with their agreement to have him travel. Both of them had earlier discussed the proposed extortion with Hammock and others (Tr. 85–96, 107–109, 111–121) and the conspiracy was still viable as regards all participants but Hammock when Kaminsky telephoned Hammock in North Carolina and told him to come to Chicago (Tr. 139–142). Accordingly, Kaminsky's act was properly attributable to his co-conspirators, petitioners included. As the court of appeals pointed out (Pet. No. 94, App. A 4–5), the basic flaw in the argument lies in petitioners' assumption that the conspiracy charge required proof that would have sustained a substantive charge. This is not the law. See *United States* v. *Rabinowich,* 238 U.S. 78, 86, *Pinkerton* v. *United States,* 328 U.S. 640, 643–644. It sufficed to show agreement which contemplated causing Hammock to travel interstate as part of the extortionate scheme.

2. The evidence was sufficient to show that petitioner Fellabaum knew that the conspiracy would involve interstate travel. Fellabaum compromised the victim in Chicago (Tr. 39–41, 77–78, 86–88, 90–91), and then called Hammock in New York to describe the favorable prospects for extortion (Tr. 86–87). He later went to New York to deliver cards from the victim's

wallet to Hammock (Tr. 90–92). Hammock went to Chicago, met Pyne, then called Fellabaum in New York and told him to return to Chicago (Tr. 106, 117, 119). Plainly Fellabaum had firsthand knowledge of the interstate aspects of the conspiracy; it is immaterial whether or not he knew specifically that Hammock would be asked to travel from North Carolina to Illinois. A co-conspirator with general knowledge of the scope of a scheme need not be shown to know all its details. *Blumenthal* v. *United States*, 332 U.S. 539, 557.

3. Petitioner Fellabaum argues that testimony of an FBI agent concerning statements which Fellabaum made to the agent on three occasions in June of 1966 should have been excluded from evidence. The basis of the claim is that the statements were made in the absence of an attorney, Mr. Sonenshine, who was representing him in another case. But on each occasion the statements were made after Fellabaum had been fully informed that he had a right to make no statement and to furnish no information, that any statement he did make could be used against him, and that he was entitled to have his attorney, Mr. Sonenshine, or anyone else he might wish present (Tr. 44–47). On each occasion, Fellabaum signed a written waiver on his right to the presence of counsel before speaking to the agent. Indeed, the signed waivers indicate that he specifically requested that Mr. Sonenshine, who also represented Kaminsky in the other case, not be present; he did not want Mr. Sonenshine to be advised that the FBI was interviewing him (Tr. 47–50, 57–64, 72–73). In the absence of any counter-

vailing testimony as to the voluntariness of the waivers, the district court denied Fellabaum's motion to suppress the statements (Tr. 72–74). There was a waiver of the right to counsel's presence sufficiently express to permit the admission of testimony concerning the statements. See *Miranda* v. *Arizona*, 384 U.S. 436, 475.

Fellabaum nevertheless now contends that since Mr. Sonenshine was his attorney, it was improper for the agent to talk to him without giving the attorney notice, citing dictum in *Mathies* v. *United States*, 374 F. 2d 312 (C.A.D.C.) (Pet. No. 191 Misc., pp. 10–11). In *Mathies*, however, the defendant had retained the attorney to represent him in the case about which he was questioned, and did not insist, as petitioner Fellabaum did, that counsel not be notified. Where the waiver of counsel's presence is clear, failure to notify counsel does not in itself preclude admission of an accused's statement. *Wilson* v. *United States*, 398 F. 2d 331 (C.A. 5); *Coughlan* v. *United States*, 391 F. 2d 371 (C.A. 9), certiorari denied, 393 U.S. 870. The situation is *a fortiori* where the accused expressly asks that counsel be neither notified nor present during the interview.

4. The remaining claims—that the instructions might have led the jury to consider Fellabaum's statements to the FBI against Pyne (No. 94)[2] and that there was a prejudicial accomplice instruction (No.

[2] The testimony concerning these statements included no reference, either express or implied, to the participation in the offense of anyone but Fellabaum. Nor is any claim here made that the use of the testimony at trial involved any violation of the principles of *Bruton* v. *United States*, 391 U.S. 123.

191 Misc.)—raise no issue of significance and are adequately dealt with in the opinion below (See Pet. No. 94, App. A 9–11, 12–13). We therefore rely on that opinion in opposing the grant of certiorari on these issues.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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